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To: All Members Enrolled in the NEFI Drug/Alcohol Testing Program

From: Donna Carcerano, Benefits Administrator, Donna@nefi.com
Mark S. Morgan, Esq., NEFI Regulatory Counsel

Re: Request for information from previous employer – FMSCA Drug/Alcohol Testing

NEFI would like to remind its members that employers must obtain from an employee's previous employers (where the employee was employed performing safety-sensitive functions), each employee's drug and alcohol testing history as a condition of employment in a safety sensitive position.

See below for the regulation that explains Safety Performance History Investigations. Please note that this is only part of qualifying a driver. The entire Part 391 should be reviewed. This can be found at this address:

http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrguide.aspx?section_type=A

§391.23 Investigation and inquiries.

(a) Except as provided in [Subpart G](#) of this part, each motor carrier shall make the following investigations and inquiries with respect to each driver it employs, other than a person who has been a regularly employed driver of the motor carrier for a continuous period which began before January 1, 1971:

(a)(1) An inquiry to each State where the driver held or holds a motor vehicle operator's license or permit during the preceding 3 years to obtain that driver's motor vehicle record.

(a)(2) An investigation of the driver's safety performance history with Department of Transportation regulated employers during the preceding three years.

(b) A copy of the motor vehicle record(s) obtained in response to the inquiry or inquiries to each State required by paragraph (a)(1) of this section must be placed in the driver qualification file within 30 days of the date the driver's employment begins and be retained in compliance with [§391.51](#). If no motor vehicle record is received from the State or States required to submit this response, the motor carrier must document a good faith effort to obtain such information, and certify that no record exists for that driver in that State or States. The inquiry to the State driver licensing agency or agencies must be made in the form and manner each agency prescribes.

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(c)(1) Replies to the investigations of the driver's safety performance history required by paragraph (a)(2) of this section, or documentation of good faith efforts to obtain the investigation data, must be placed in the driver investigation history file, after October 29, 2004, within 30 days of the date the driver's employment begins. Any period of time required to exercise the driver's due process rights to review the information received, request a previous employer to correct or include a rebuttal, is separate and apart from this 30-day requirement to document investigation of the driver safety performance history data.

(c)(2) The investigation may consist of personal interviews, telephone interviews, letters, or any other method for investigating that the carrier deems appropriate. Each motor carrier must make a written record with respect to each previous employer contacted, or good faith efforts to do so. The record must include the previous employer's name and address, the date the previous employer was contacted, or the attempts made, and the information received about the driver from the previous employer. Failures to contact a previous employer, or of them to provide the required safety performance history information, must be documented. The record must be maintained pursuant to [§391.53](#).

(c)(3) Prospective employers should report failures of previous employers to respond to an investigation to the FMCSA following procedures specified at [§386.12](#) of this chapter and keep a copy of such reports in the Driver Investigation file as part of documenting a good faith effort to obtain the required information.

(c)(4) **Exception.** For drivers with no previous employment experience working for a DOT regulated employer during the preceding three years, documentation that no investigation was possible must be placed in the driver history investigation file, after October 29, 2004, within the required 30 days of the date the driver's employment begins.

(d) The prospective motor carrier must investigate, at a minimum, the information listed in this paragraph from all previous employers of the applicant that employed the driver to operate a CMV within the previous three years. The investigation request must contain specific contact information on where the previous motor carrier employers should send the information requested.

(d)(1) General driver identification and employment verification information.

(d)(2) The data elements as specified in [§390.15\(b\)\(1\)](#) of this chapter for accidents involving the driver that occurred in the three-year period preceding the date of the employment application.

(d)(2)(i) Any accidents as defined by [§390.5](#) of this chapter.

(d)(2)(ii) Any accidents the previous employer may wish to provide that are retained pursuant to [§390.15\(b\)\(2\)](#), or pursuant to the employer's internal policies for retaining more detailed minor accident information.

(e) In addition to the investigations required by paragraph (d) of this section, the prospective motor carrier employers must investigate the information listed below in this

paragraph from all previous DOT regulated employers that employed the driver within the previous three years from the date of the employment application, in a safety-sensitive function that required alcohol and controlled substance testing specified by [49 CFR part 40](#).

(e)(1) Whether, within the previous three years, the driver had violated the alcohol and controlled substances prohibitions under [subpart B of part 382](#) of this chapter, or [49 CFR part 40](#).

(e)(2) Whether the driver failed to undertake or complete a rehabilitation program prescribed by a substance abuse professional (SAP) pursuant to [§382.605](#) of this chapter, or [49 CFR part 40, subpart O](#). If the previous employer does not know this information (e.g., an employer that terminated an employee who tested positive on a drug test), the prospective motor carrier must obtain documentation of the driver's successful completion of the SAP's referral directly from the driver.

(e)(3) For a driver who had successfully completed a SAP's rehabilitation referral, and remained in the employ of the referring employer, information on whether the driver had the following testing violations subsequent to completion of a [§382.605](#) or [49 CFR part 40, subpart O](#) referral:

(e)(3)(i) Alcohol tests with a result of 0.04 or higher alcohol concentration;

(e)(3)(ii) Verified positive drug tests;

(e)(3)(iii) Refusals to be tested (including verified adulterated or substituted drug test results).

(f) A prospective motor carrier employer must provide to the previous employer the driver's written consent meeting the requirements of [§40.321\(b\)](#) for the release of the information in paragraph (e) of this section. If the driver refuses to provide this written consent, the prospective motor carrier employer must not permit the driver to operate a commercial motor vehicle for that motor carrier.

(g) After October 29, 2004, previous employers must:

(g)(1) Respond to each request for the DOT defined information in paragraphs (d) and (e) of this section within 30 days after the request is received. If there is no safety performance history information to report for that driver, previous motor carrier employers are nonetheless required to send a response confirming the non-existence of any such data, including the driver identification information and dates of employment.

(g)(2) Take all precautions reasonably necessary to ensure the accuracy of the records.

(g)(3) Provide specific contact information in case a driver chooses to contact the previous employer regarding correction or rebuttal of the data.

(g)(4) Keep a record of each request and the response for one year, including the date, the party to whom it was released, and a summary identifying what was provided.

(g)(5) **Exception.** Until May 1, 2006, carriers need only provide information for accidents that occurred after April 29, 2003.

(h) The release of information under this section may take any form that reasonably ensures confidentiality, including letter, facsimile, or e-mail. The previous employer and its agents and insurers must take all precautions reasonably necessary to protect the driver safety performance history records from disclosure to any person not directly involved in forwarding the records, except the previous employer's insurer, except that the previous employer may not provide any alcohol or controlled substances information to the previous employer's insurer.

(i)(1) The prospective employer must expressly notify drivers with Department of Transportation regulated employment during the preceding three years—via the application form or other written document prior to any hiring decision—that he or she has the following rights regarding the investigative information that will be provided to the prospective employer pursuant to paragraphs (d) and (e) of this section:

(i)(1)(i) The right to review information provided by previous employers;

(i)(1)(ii) The right to have errors in the information corrected by the previous employer and for that previous employer to re-send the corrected information to the prospective employer;

(i)(1)(iii) The right to have a rebuttal statement attached to the alleged erroneous information, if the previous employer and the driver cannot agree on the accuracy of the information.

(i)(2) Drivers who have previous Department of Transportation regulated employment history in the preceding three years, and wish to review previous employer-provided investigative information must submit a written request to the prospective employer, which may be done at any time, including when applying, or as late as 30 days after being employed or being notified of denial of employment. The prospective employer must provide this information to the applicant within five (5) business days of receiving the written request. If the prospective employer has not yet received the requested information from the previous employer(s), then the five-business days deadline will begin when the prospective employer receives the requested safety performance history information. If the driver has not arranged to pick up or receive the requested records within thirty (30) days of the prospective employer making them available, the prospective motor carrier may consider the driver to have waived his/her request to review the records.

(j)(1) Drivers wishing to request correction of erroneous information in records received pursuant to paragraph (i) of this section must send the request for the correction to the previous employer that provided the records to the prospective employer.

(j)(2) After October 29, 2004, the previous employer must either correct and forward the information to the prospective motor carrier employer, or notify the driver within 15 days of receiving a driver's request to correct the data that it does not agree to correct the data. If the previous employer corrects and forwards the data as requested, that

employer must also retain the corrected information as part of the driver's safety performance history record and provide it to subsequent prospective employers when requests for this information are received. If the previous employer corrects the data and forwards it to the prospective motor carrier employer, there is no need to notify the driver.

(j)(3) Drivers wishing to rebut information in records received pursuant to paragraph (i) of this section must send the rebuttal to the previous employer with instructions to include the rebuttal in that driver's safety performance history.

(j)(4) After October 29, 2004, within five business days of receiving a rebuttal from a driver, the previous employer must:

(j)(4)(i) Forward a copy of the rebuttal to the prospective motor carrier employer;

(j)(4)(ii) Append the rebuttal to the driver's information in the carrier's appropriate file, to be included as part of the response for any subsequent investigating prospective employers for the duration of the three-year data retention requirement.

(j)(5) The driver may submit a rebuttal initially without a request for correction, or subsequent to a request for correction.

(j)(6) The driver may report failures of previous employers to correct information or include the driver's rebuttal as part of the safety performance information, to the FMCSA following procedures specified at [§386.12](#).

(k)(1) The prospective motor carrier employer must use the information described in paragraphs (d) and (e) of this section only as part of deciding whether to hire the driver.

(k)(2) The prospective motor carrier employer, its agents and insurers must take all precautions reasonably necessary to protect the records from disclosure to any person not directly involved in deciding whether to hire the driver. The prospective motor carrier employer may not provide any alcohol or controlled substances information to the prospective motor carrier employer's insurer.

(l)(1) No action or proceeding for defamation, invasion of privacy, or interference with a contract that is based on the furnishing or use of information in accordance with this section may be brought against—

(i) A motor carrier investigating the information, described in paragraphs (d) and (e) of this section, of an individual under consideration for employment as a commercial motor vehicle driver,

(l)(1)(ii) A person who has provided such information; or

(l)(1)(iii) The agents or insurers of a person described in paragraph (l)(1)(i) or (ii) of this section, except insurers are not granted a limitation on liability for any alcohol and controlled substance information.

(l)(2) The protections in paragraph (l)(1) of this section do not apply to persons who knowingly furnish false information, or who are not in compliance with the procedures specified for these investigations.

(m)(1) The motor carrier must obtain an original or copy of the medical examiner's certificate issued in accordance with §391.43, and any medical variance on which the certification is based, and place the records in the driver qualification file, before allowing the driver to operate a CMV.

(m)(2) **Exception.** For drivers required to have a commercial driver's license under part 383 of this chapter:

(m)(2)(i) Beginning January 30, 2012, using the CDLIS motor vehicle record obtained from the current licensing State, the motor carrier must verify and document in the driver qualification file the following information before allowing the driver to operate a CMV:

(m)(2)(i)(A) The type of operation the driver self-certified that he or she will perform in accordance with §383.71(a)(1)(ii) and 383.71(g) of this chapter, or

(m)(2)(i)(B) **Exception.** If the driver provided the motor carrier with a copy of the current medical examiner's certificate that was submitted to the State in accordance with §383.73(a)(5) of this chapter, the motor carrier may use a copy of that medical examiner's certificate as proof of the driver's medical certification for up to 15 days after the date it was issued.

(m)(2)(ii) Until January 30, 2014, if a driver operating in non-excepted, interstate commerce has no medical certification status information on the CDLIS MVR obtained from the current State driver licensing agency, the employing motor carrier may accept a medical examiner's certificate issued to that driver prior to January 30, 2012, and place a copy of it in the driver qualification file before allowing the driver to operate a CMV in interstate commerce.